No. 90-761

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

CHOPIN ASSOCIATES, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its Partners, and MIAMI CENTER LIMITED PARTNERSHIP, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its GENERAL PARTNERS,

Petitioners,

v.

FRED STANTON SMITH, Trustee, THE BANK OF NEW YORK, CITY NATIONAL BANK OF FLORIDA, as Trustee of Land Trust #5008793, DADE COUNTY, FLORIDA, a Municipality, JOEL ROBBINS, as Property Appraiser of DADE COUNTY, FLORIDA, FRED GANZ, as Tax Collector of DADE COUNTY, FLORIDA, RANDALL MILLER, as Executive Director of the FLORIDA DEPARTMENT OF REVENUE, S. HARVEY ZIEGLER, as Escrow Agent for the Miami Center Liquidating Trust, and HERBERT STETTIN, as Escrow Agent for Miami Center Liquidating Trust,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS DADE COUNTY, FLORIDA, JOEL ROBBINS AND FRED GANZ IN OPPOSITION

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The only opinions relevant to the Petition for Writ of Certiorari herein are the Order Approving Amended Settlement of Ad Valorem Tax Claims entered by the United States Bankruptcy Court for the Southern District of Florida on November 18, 1988, Pet. App. 72; the Order Affirming Bankruptcy Court's Order Approving Amended Settlement of Ad Valorem Tax Claims entered by the United States District Court for the Southern District of Florida on July 6, 1989, Pet. App. 34; and the *per curiam* affirmance of the Bankruptcy Court's decision entered by the United States Court of Appeals for the Eleventh Circuit on August 14, 1990, Pet. App. 32.

JURISDICTION

The Petitioners seek review of the Eleventh Circuit's single-sentence affirmance of the Bankruptcy Court's approval of the comprehensive ad valorem tax settlement. The Petitioners have wholly failed to establish any jurisdictional basis for granting the Petition for Writ of Certiorari. They have not demonstrated the existence of a conflict among the United States Courts of Appeals or the existence of an important question of federal law which has not been, but should be settled by this Court. *See* Sup. Ct. R. 10.1(a)-(c).

STATEMENT OF THE CASE

Over six years ago, the Petitioners, two of five related Debtors,[1] filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida. This is their eighth attempt at review in this Court. It follows their more than fifty appeals to the lower courts.[2]

The Petitioners here seek review of an order of the Eleventh Circuit Court of Appeals affirming the Bankruptcy Court's approval of a settlement of Dade County, Florida's ad valorem tax claims against the Miami Center. The settlement was entered into by Dade County, the Liquidating Trustee of the Miami Center Liquidating Trust, and the Bank of New York, and submitted to the Bankruptcy Court for judicial review and approval. The Debtors objected to this settlement and filed a separate adversary proceeding to block the compromise. After lengthy hearings and extensive briefing, the Bankruptcy Court by order dated November 18, 1988 approved the amended settlement. The Debtors appealed to the District Court and the Eleventh Circuit Court of Appeals, both of which affirmed. From these appeals, this Petition follows.

After filing voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code in 1984,

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[1] The Petitioner/Debtors are Chopin Associates and Miami Center Liquidating Partnership, which in turn are related to and/or controlled by Debtors Theodore B. Gould, Miami Center Corporation and Holywell Corporation.

[2] Of the other seven petitions, six have been denied and one, filed in October, 1990, is pending.

and substantive consolidation of the Debtors' estates in 1985, the Bankruptcy Court confirmed the Amended Plan of Reorganization on August 8, 1985. Pursuant thereto, a liquidating trustee was appointed and took charge of the Debtors' property, including for purposes relevant here, the Miami Center Project and numerous lawsuits to which the Debtors were parties. The Bank of New York acquired the Miami Center Project from the trustee, for $255.6 million, a valuation based upon an MAI appraisal. *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

In accordance with the Plan, the property was transferred with Dade County's tax liens in place, and with no objection reserved in the Plan, or otherwise, to the validity of these tax liens. Conversely, the only preserved property tax question was the final amount of each of the tax assessments and the resulting tax liability. In fact, the Plan, with its contract for sale, required payment of the *taxes and interest* at closing. This payment was never made. Instead, an escrow fund was created in the amount of $7,006,114.65 to ensure payment when the amount of each assessment was finally determined in the State court tax cases.

For the past 11 years the Miami Center Project has been involved in ad valorem tax litigation, contesting each and every assessment, not the first of which has been tried. This State court litigation continued with the full knowledge, consent and authorization of the Bankruptcy Court. During reorganization, the Bankruptcy Court authorized retention of special ad valorem tax

counsel, as well as expert witnesses for this litigation. It also authorized payment of large sums for costs and fees.

While taxes were paid in full for the years 1979 through 1981, in each year from 1982 through 1985 only a portion of the taxes was paid. Thus, the statutorily-created first priority ad valorem real property tax liens attaching to the property annually from 1982 through 1985 remain outstanding and unsatisfied.

Immediately following the October 1985 closing, settlement negotiations with the County were undertaken and continued through 1986. After reaching an impasse, Mr. Gould requested the Liquidating Trustee to

> instruct Irving Wolff to file the complaint already prepared in the United States District Court to both bar the County's claim for not having filed Proofs of Claim in the Chapter XI proceeding and also for engaging in discriminatory and non-uniform assessment practices.[3]

Subsequent to dismissal of that district court action, *Miami Center Liquidating Trust v. Dade County, Fla.*, 75 Bankr. 61 (S.D. Fla. 1987), settlement discussions were again commenced between the County, the Liquidating Trustee and new counsel for the Trust, Herbert Stettin. Ultimately, a settlement was reached between the Liquidating Trustee and the County. As amended and approved it was a settlement of *all* of the issues and disputes between the parties. Pet. App. 63. It reduced the liability of the Trust for disputed 1979 through 1985 ad

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[3] Letter from Theodore B. Gould to Fred Stanton Smith, dated December 9, 1986, re: proposed settlement of 1979 through 1985 taxes.

valorem taxes to $2,720,324 as of March 31, 1988. On November 18, 1988, the Bankruptcy Court entered a 12-page order approving the amended ad valorem tax settlement complete with detailed findings of fact and conclusions of law. Pet. App. 72.

SUMMARY OF ARGUMENT

The Petition for Certiorari should be denied. The Petition brings before this Court a single-sentence decision and opinion of the Eleventh Circuit Court of Appeals finding that the lower courts did not abuse their discretion in approving the ad valorem tax settlement. In that opinion, the Eleventh Circuit correctly affirmed the District Court decision, which in turn affirmed the Bankruptcy Court's findings and conclusions that the amended settlement of the ad valorem tax claims was reasonable and in the best interest of the Liquidating Trust and the creditors. The record overwhelmingly supports the Bankruptcy Court's findings and conclusions. In this appeal, Petitioners continue to insist on individual merit determinations of every property tax-related issue. The case law specifically holds, however, that the Debtors' arguments must be viewed as the Bankruptcy Court viewed them, i.e., in light of: (1) the probability of success; (2) the disastrous effect that the likely adverse result in the State court tax cases would have on the Liquidating Trust; and (3) the expense, inconvenience, and delay of continued litigation.

The Petition fails to demonstrate that the Eleventh Circuit decision departs from or conflicts with any decision of this Court or of any Circuit Court. Instead, the Petition constitutes in the main an untimely and impermissible collateral attack on certain features of the confirmed Plan of Reorganization. That Plan has long since become final and law of the case.

The priority and status of Dade County's real property tax liens were fully determined and firmly established vis-a-vis all classes of creditors in the confirmed Plan of Reorganization. The Bankruptcy Court could not have erred for failing to decide these questions of status and priority since it had already done so.

The ad valorem tax settlement properly disposed of 14 separate tax disputes pending in State court for as long as 9 years. These lawsuits had been recognized and continually dealt with in the administration of this bankruptcy at substantial expense to the estates of the Debtors. Termination of lawsuits by settlement is an appropriate function of a bankruptcy court. This was especially appropriate here where the significant economic advantage to the Liquidating Trust was found to substantially outweigh the devastating impact that adverse rulings would have had.

The ad valorem tax settlement also properly disposed of issues surrounding whether the County had filed a proof of claim. Resolution of the County's statutory ad valorem tax liens was necessary to achieve long overdue compliance with the Bankruptcy Court's 1985 Plan of

Reorganization. The Debtor's scheduling of the property tax liability, pre- and post-confirmation conduct of the parties and case law were correctly considered and applied by the lower courts in resolving the issues in this property tax settlement.

The Eleventh Circuit dispatched the claims of Petitioners herein in a single sentence, with no citation to authority. It is apparent that the Circuit Court viewed the Debtors' claims as lacking precedential significance. Thus, in addition to disposing of the issues correctly, the Circuit Court's single-sentence opinion lacks impact as stare decisis.

For the foregoing reasons, the Petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. CERTIORARI JURISDICTION HEREIN IS LIMITED TO A REVIEW OF THE ELEVENTH CIRCUIT'S DECISION APPROVING THE AD VALOREM TAX SETTLEMENT AND DOES NOT INCLUDE REVIEW OF THE CONFIRMED PLAN OF REORGANIZATION OR OTHER UNRELATED ISSUES.

By certiorari the Petitioners seek review of a single-sentence affirmance by the Eleventh Circuit Court of Appeals unequivocally holding that neither the Bankruptcy Court nor the United States District Court, Southern District of Florida, abused their discretion or acted

improperly in approving and affirming the comprehensive ad valorem tax settlement.[4] The Liquidating Trustee of the Miami Center Liquidating Trust, the Bank of New York and the Dade County Taxing Authorities submitted this settlement to the Bankruptcy Court, Pet. App. 59, and the court approved the same. Pet. App. 71. Thereafter, the District Court affirmed with a thorough and extensive review. Pet. App. 34. The Eleventh Circuit affirmed.

The Bankruptcy Court order, from which the affirmances originate, is replete with thorough and extensive findings of fact and conclusions of law supporting the Court's approval of the comprehensive ad valorem tax settlement. Entry of this detailed order followed a two-day evidentiary hearing, submission of substantial testimony, documentary evidence and deposition testimony, exhaustive written closing arguments by the Petitioners and Respondents herein, a Bankruptcy Court-mandated amendment to the settlement in response to specific objections and complaints of the Petitioner/Debtors, and a final evidentiary hearing.

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[4] In its entirety this decision reads:

PER CURIAM:

> The bankruptcy court had the authority to consider the settlement reached between the trustee and Dade County concerning questions surrounding outstanding ad valorem real property taxes and did not abuse its discretion in approving the settlement.

AFFIRMED. Pet. App. 32.

In rejecting the Petitioners' plea for specific merit determinations of every objection and legal claim proposed to be compromised by the tax settlement, the Bankruptcy Court explained the rationale for its approval of this settlement by quoting from *In re Teltronics, Inc.*, 762 F.2d 185 (2d Cir. 1985), as follows:

> 20 . . . The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. . . . Thus, this Court need not resolve each disputed matter in determining the propriety of the settlement, rather, the Court may, and should, make a pragmatic decision on the basis of all equitable factors. Pet. App. 80.

In paragraph 23 the Court continues,

> One of the obligations imposed by *Jackson Brewing Corp., supra,* [624 F.2d 605 (5th Cir. 1980)] upon bankruptcy courts engaged in determining whether to approve a settlement proposed requires a consideration of 'all the factors bearing on the wisdom of the compromise'. The Court believes it has done so and it recognizes the benefits which flow to each of the parties involved. The taxing authorities received a substantial amount of cash and an end to time-consuming and expensive litigation on their part. The Bank of New York receives property free of any further claims by the taxing authorities, and the debtors receive the resolution of

> County tax claims on excellent terms. In sum, having reviewed the evidence and the documents received into evidence, together with having considered the equities involved, the Court finds and determines that the amended settlement agreement does not 'fall below the lowest point in the range of reasonableness.' The terms of the amended settlement are reasonable and in the best interest of the liquidating trust. . . . Pet. App. 81-82.

This tax settlement resolved disputes over ad valorem taxes on the Miami Center property which had been valued by an MAI appraisal—accepted and relied upon by the courts administering this bankruptcy—at a fair market value of $255.6 million. While this $255.6 million valuation would have been probative of the fair market value of the subject property in the pending State court tax litigation seeking substantial assessment reductions, the $162.5 million assessment for the tax years 1984 and 1985, utilized in the overall tax settlement, obviously achieved substantial savings and significant economic benefits to the Liquidating Trust necessarily inuring to the creditors.

Because the Petitioners continue to insist on entitlement to a merit determination of each separate aspect of the tax settlement, and because they continue to confuse and intermix in this proceeding the issues adjudicated or pending in other proceedings or between other parties, the Petition for Certiorari herein can best be understood by first briefly examining what this appeal does not involve.

This is not an appeal of the confirmed Plan of Reorganization for the five consolidated Petitioner/Debtors.

The provisions of that Plan were approved by the Bankruptcy Court[5] in its order of confirmation entered August 8, 1985. The United States District Court affirmed[6] and appeal thereof was dismissed by the Eleventh Circuit as moot.[7] Certiorari was denied by this Court.[8] The plan of reorganization has thus become law of the case.

This is not an appeal of the transfer from the individual Debtors to the Miami Center Liquidating Trust of right, title and interest in the fourteen ad valorem tax cases pending in State court. Transfer of control of those cases to the Miami Center Liquidating Trust was an integral part of the terms of the Amended Plan of Reorganization long since final and binding on the parties.

This is not an appeal of determinations of the individual classes of lienholders and creditors. These determinations were made as an integral part of the Amended Plan of Reorganization approved by the Bankruptcy Court on August 8, 1985, now final and the law of the case.

This is not an appeal of the income tax issues that pend in the Eleventh Circuit Court of Appeals. The Internal Revenue Service is not now and never has been an objector to the ad valorem tax settlement and related issues involved herein.

This is not an appeal of numerous orders entered by the Bankruptcy Court at the request of both the

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[5] *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985).

[6] *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986).

[7] *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988).

[8] 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

Liquidating Trustee and/or the Petitioners pre- and post-confirmation which specifically authorized (1) the filing of additional State court tax cases; (2) use of Trust assets to make partial payments of property taxes; (3) use of Trust assets to maintain the State court tax litigation through the payment of court costs, attorney's fees and expert witness fees; and (4) authorizing retention of special counsel and expert witnesses for prosecuting the State court tax litigation. These orders long since became final and the law of the case.

This is not an appeal of any pre-confirmation (i.e., timely-filed) adversary complaint to determine the extent, priority and/or validity of Dade County's real property tax liens. This is so because no such complaint was ever filed. Moreover, the priority and validity of these liens was fully recognized and established in the Amended Plan of Reorganization as confirmed by the Bankruptcy Court and now the law of the case.

This is not an appeal of the creation of the escrow fund done as a post-confirmation pre-sale amendment to the plan of reorganization and contract for sale of the Miami Center property to the designee of the Bank of New York. This fund was created at the time of closing to ensure that there could be an ultimate delivery of the Miami Center Project to the Bank of New York free and clear of liens in accordance with the Amended Plan, and at the same time allow the Debtors and/or Liquidating Trust to continue toward reaching a final resolution of the State court tax cases without being prejudiced by having to comply with the Amended Plan's requirement—payment in full of pending tax liens. Creation of this fund—as well as its specific designation for the payment of property taxes—has long since become final pursuant to

orders of the Bankruptcy Court, no appeal of which remains pending.

Finally, this is not an appeal of any equal protection or constitutional objection to the individual tax assessments on the Miami Center property for the years 1979 through 1985. When the Bankruptcy Court approved the tax settlement, these objections had been raised and/or remained pending in the State court for as long as nine years without any resolution thereof in fourteen separate tax cases. Not one of these cases was ever litigated to finality nor were any of the Debtors' constitutional challenges ever proven.

Consequently, in the event this Court were to grant the Petition for Certiorari, the only issue before this Court would be the propriety *vel non* of the Eleventh Circuit decision. In one sentence, the Circuit Court rejected (without citation to authority) all of Petitioners' claims. *See* note 4 at p. 8, for the text of the Eleventh Circuit decision. In addition to being correct, the Circuit Court decision approving settlement of property tax claims does not conflict either facially or in principle with any other circuit court decision or with any decision of this Court. The Petition should be denied.

II. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE AD VALOREM TAX SETTLEMENT EITHER BY FAILING TO DETERMINE THE COMPARATIVE PRIORITY OF CLAIMS AGAINST THE ESTATE, OR BY FAILING TO DETERMINE THE ESTATE'S NET VALUE.

The voluminous evidence and argument amassed in response to the Motion for Approval of the ad valorem

tax settlement and addressed in the orders of the Bankruptcy Court, District Court, and the Eleventh Circuit Court of Appeals make it amply clear that the Bankruptcy Judge herein fully apprised himself of all of the facts, equitable considerations and legal principles necessary to make a reasoned and lawful decision approving the tax settlement. Notwithstanding the welter of evidence and legal argument below, Petitioners ask this Court to grant certiorari review, belatedly asserting that the Bankruptcy Court abused its discretion in approving the tax settlement for the alleged reasons that it did not adequately determine either the priority of tax claims or the net value of assets in the bankruptcy estate.

First and foremost, conspicuous by its absence from the record herein is any such contention by way of argument, evidence or legal objection presented to the Bankruptcy Court in opposition to the settlement.

Second, wholly ignored by the Petitioners is that the status of Dade County's property tax liens was fully determined and established with the Bankruptcy Court's approval of the amended plan of reorganization in August of 1985 and implementation thereof with the closing on the contract for sale of the Miami Center in October of 1985. Pursuant thereto, the superiority of these tax liens was fully recognized and established and the payment thereof required as a condition precedent to delivery of Miami Center to the Bank of New York or its designee free and clear of liens. This determination of priority, vis-a-vis the eight classes of creditors defined in the Amended Plan, became law of the case when the Eleventh Circuit Court of Appeals dismissed as moot the

Debtors' attack on the amended plan of reorganization.[9] Having determined the superiority of the tax liens in August of 1985, and having never been asked by the Debtors or anyone else to revisit this issue at the April and November 1988 hearings on the tax settlement, the Bankruptcy Court cannot be said to have abused its discretion because it failed to redecide that already decided.

Third, no evidence was adduced below supporting the Debtors' reliance upon the decision in *Matter of Aweco, Inc.*, 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S. 80, 105 S.Ct. 244, 83 L.Ed.2d 182 (1984). No creditors—senior or junior—have raised a single objection to the Comprehensive Tax Settlement. Moreover, there is no evidence supporting Petitioners' suggestion that the assets of the Liquidating Trust are insufficient to pay any creditors whose claims might be senior to those of Dade County. Approval of the ad valorem tax settlement in November of 1988 enabled the Liquidating Trustee to finally achieve compliance with the requirements of the Amended Plan. By virtue thereof, the escrow fund—as an escrow fund and not property of the Liquidating Trust—became available for distribution.

The Plan of Reorganization required satisfaction of Dade County's real property tax liens prior to conveyance of the property to the nominee of the Bank of New York. For the sole purpose of allowing a continuation of the State court proceedings objecting to the amount—as distinguished from the validity—of the County's real

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[9] In their appeal of the order confirming the amended plan of reorganization, the Debtors never objected to the provisions dealing with payment of the ad valorem tax liens as superior first priority tax liens.

property taxes, an escrow fund of $7,006,114.65 was established at the time of the closing on the Miami Center property. Notwithstanding the Debtors' assertions to the contrary, this escrow fund never became property of the Liquidating Trust. For three years after the October 1985 closing, the State court tax assessment cases continued accruing interest and further draining the estate of assets expended for attorney's fees and expert witness fees. At the end thereof, not a single State court action had been brought to conclusion. As a result of the Comprehensive Tax Settlement, a net of $2,720,325 as of March 31, 1988 plus interest was payable for Dade County taxes, releasing the balance of said escrow fund, $4,285,790 plus interest, to the Trust as Trust property for payment of its other liabilities. Approval of the tax settlement greatly reduced liabilities of the Liquidating Trust, increased its assets, and, as found by the Bankruptcy Court, was fair, reasonable and in the best interest of the Liquidating Trust, its creditors and beneficiaries.

The tax settlement allowed for compliance with the previously-approved Amended Plan of Reorganization, by finally satisfying pending tax liens on property which was required to be conveyed free and clear thereof. It settled the amount of tax liability which had been pending for as long as nine years. It terminated the endless expenses to the Liquidating Trust of continuing this litigation, and it assured the availability of additional assets —earmarked three years earlier for the payment of ad valorem taxes—for other creditors and beneficiaries of the estate. Consequently, the Bankruptcy Court did not abuse its discretion or otherwise violate the principles of law enunciated by the Fifth Circuit Court of Appeals in *Matter of Aweco. Id.*

Fourth, well illustrative of the equitable factors before the Bankruptcy Court in its consideration of whether to approve the tax settlement was the Petitioners' own conduct before the Bankruptcy Court for the four years between August of 1984 and November of 1988 in dealing with the tax controversies. The Bankruptcy Court had been asked to and did appoint special counsel for handling the State court tax cases. Retention of various experts for that litigation had been authorized. Expert witness and attorney fee awards had been approved. Not only had the Liquidating Trustee acquired the lawsuits by operation of the Plan of Reorganization, but dominion and control thereover had been a familiar part of the administration of these bankruptcy estates. From the inception of these bankruptcies, the Debtors scheduled claims for taxes and led the Bankruptcy Court, Dade County and all other parties to believe that the Debtors were disputing only the amount—as distinguished from the validity of the tax claims. District Judge Kehoe recounted the Bankruptcy Court's anger when two and one-half years after the commencement of these proceedings the Chief Bankruptcy Judge learned that the Debtors and Liquidating Trustee were, then, for the first time attempting by an action in the United States District Court to challenge the validity of the tax liens, as well as the propriety of the assessments on constitutional and equal protection grounds. The Court concluded this new strategy was "playing games" and that:

> This is the first moment since the beginning of this lawsuit that it has been indicated to me in any respect that the status of the County tax claim as a claimant against this estate is not recognized because no claim was filed. It is the

> first time that it has been hinted. The Debtor recognized it constantly and you have recognized it constantly up until now, you have set aside a reserve for it, and now you are saying this whole matter must be decided in a court that cannot even hear it earlier than a year from now because no claim was filed. I am appalled.

Miami Center Liquidating Trust v. Dade County, 75 Bankr. 61, 64 (S.D. Fla. 1987).

Inconsistencies and position changes by these Petitioners are not new in these proceedings. While the Petitioners continued to object to the approved settlement satisfying the Liquidating Trustee's liability for disputed ad valorem taxes with $2.7 million plus interest from the escrow fund, the Debtors ignore their own scheduling of tax liability to Dade County in the amount of $4,959,186.16. App. 3. When reminded of this scheduling on Court Paper 121, the Petitioners simply averred in their Reply Brief to the Eleventh Circuit Court of Appeals that they mistakenly omitted designation of the claim as contingent, disputed or unliquidated. The approved tax settlement certainly satisfied the tax liability for an amount substantially less than that listed on the Petitioner/Debtors' own schedules. Standing alone, this fact is sufficient to sustain affirmance of the Bankruptcy Court's approval of the ad valorem tax settlement. The Bankruptcy Court is a court of equity. *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 527, 104 S.Ct. 1188, 1197, 79 L.Ed.2d 482, 496 (1983).

Approval of the tax settlement was not an abuse of discretion. The United States District Court, Southern District of Florida, and the Eleventh Circuit fully and completely reviewed all issues raised and/or re-raised by

the Petitioners herein. The Plan of Reorganization has long since become final, has been substantially consummated and is incapable of being unwound so as to restore the parties to the status quo. *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1554 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). Its requirement of full payment of Dade County's real property taxes necessarily established the priority of the tax liens as of the time of its approval, August 8, 1985. With this Court's denial of certiorari in 1988, the priority of payment of claims as an integral part of the approved Plan of Reorganization became final. The Bankruptcy Court in approving the ad valorem tax settlement did not abuse its discretion and did not fail to make full and complete findings as were necessary for a reasoned and proper judgment.

III. THE BANKRUPTCY COURT ACTED WITHIN ITS AUTHORITY AND DID NOT ABUSE ITS DISCRETION IN APPROVING THE AD VALOREM TAX SETTLEMENT WHICH NECESSARILY DISPOSED OF STATE COURT TAX CASES.

Petitioners suggest to this Court, as they have in every earlier facet of these proceedings, that the Bankruptcy court acted improperly in approving the tax settlement because that approval necessarily resolved the pending State court tax cases. Petitioners' logic is flawed and certainly falls far short of any demonstration that the decision of the Eleventh Circuit Court of Appeals herein is either "(a) . . . in conflict with the decision of another United States court of appeals on the same matter; . . . or (c) . . . decided an important question of *federal law* which

has not been, but should be, settled by this Court. . . . " Sup. Ct. R. 10.

First, a fundamental aspect of the property tax settlement as approved by the Bankruptcy Court was that it was to operate as a resolution of all related property tax disputes. In addition to fixing with certainty the amount of tax liability as between the parties, the settlement terminated ongoing liability for court costs and attorney's fees. Finalizing the amount of liability for the Liquidating Trust is harmonious with the spirit and intent of the Bankruptcy Code.

Second, Petitioners' suggestion that the State court actions should not have been settled because the tax questions were pending in courts other than the Bankruptcy Court is frivolous in the context of bankruptcy proceedings. While the Petitioners continue to advance this position, the Eleventh Circuit Court of Appeals in a related proceeding categorically rejected Petitioners' chastisement of the Bankruptcy Court for settling non-bankruptcy court cases. As therein stated:

> Dismissal of lawsuits that are assets of the estate is a not-unfamiliar feature of reorganization plans. The Debtors' suggestion that the Bankruptcy Court lacks power, exercised pursuant to a reorganization plan, to direct a trustee to dismiss a suit in a court other than the bankruptcy court is not supported by authority cited to us or by common sense.

Miami Center Limited Partnership v. Bank of New York, supra, 838 F.2d at 1557.

Third, the Petitioners attempt to create a distinction between the 1979 through 1982 and the 1983 through 1985

overassessment State court tax cases based upon whether either a refund of taxes or reduction in tax liability was sought. Such distinction is meritless as one without a legal difference. The result of the tax settlement was to achieve finality of the Liquidating Trust's liability for taxes, interest, court costs and attorney's fees. The approved settlement did that. The Bankruptcy Court's approval thereof was proper, not an abuse of discretion, and not outside the court's jurisdiction.

Fourth, as they have in each of the lower courts, consistent with their position over the past eleven years, the Petitioners continue to argue that the settlement is improper because either each of the initial tax assessments or the settlement as approved by the Bankruptcy Court is discriminatory or constitutes a denial of equal protection. From 1979 through 1985 the Petitioners filed State court actions challenging every assessment of the Miami Center Project on the basis of alleged discrimination. The Petitioners *never* proved any such discrimination. From 1984 through 1988 when the Bankruptcy Court approved the tax settlement, these tax cases had remained pending with the blessing of the Bankruptcy Court, yet no judicial finding of discrimination was ever made. The Petitioners also took their claims of discriminatory assessment practices to the United States District Court, Southern District of Florida, after their attempts to reach a settlement with Dade County taxing officials had failed. They were similarly unsuccessful in establishing the validity of these claims. *Miami Center Liquidating Trust v. Dade County, Fla.*, 75 Bankr. 61 (S.D. Fla. 1987).

Best illustrative of why the Petitioners have been wholly unable to prove discrimination is their own convoluted aberration of the record in these proceedings with respect to the tax assessments here at issue. (1) Petitioners argue on page 26 of their Petition that because the Florida Supreme Court in *Southern Bell Telephone and Telegraph Co. v. County of Dade*, 275 So.2d 4, 9 (Fla. 1973), held that "the price at which property is sold as indicated by documentary stamps on the instrument is prima facie evidence of its value . . . ," the 1979 assessment on the subject property, $1,373,024 higher than the purchase price, is discriminatory. It is axiomatic in tax assessment law that one sale does not a market make. The sale in question occurred fourteen months after the 1979 assessment was made. More importantly, if one is to accept as correct the Petitioners' reliance upon their suggested application of *Southern Bell*, then it must follow that the 1984 and 1985 tax assessments on the Miami Center Project settled at $162.5 million for each year should be increased to the $255.6 million price reflected by the sales contract closed on October 10, 1985. Of course, this Court can readily perceive the economically disastrous results that such increased assessments would have on the Liquidating Trust's ability to pay remaining creditors. (2) Petitioners have attempted to elicit this Court's sympathy for their equal protection arguments by their claim in note 29, page 26, that the 1984 assessment on the hotel portion of the property, as reduced by the settlement, was allegedly further reduced by 38% for the 1989 assessment. The 1989 tax assessment on the hotel is certainly nowhere in the record. Without a detailed response thereto, but so that this Court be correctly informed, suffice it to say that

the property assessed as the hotel in 1989 was substantially different than that assessed as the hotel in earlier years because of a redistribution and/or reallocation of portions of the original hotel property (parking, commercial and retail space) to other folio numbers. The 1989 assessment on the total Miami Center Project exceeded the settlement value for 1984 notwithstanding the Petitioners' erroneous statement to the contrary.

From the foregoing it should be apparent that Petitioners' repeated attempts to "examine the trees and ignore the forest" is simply not a meaningful tool for the review of this comprehensive tax settlement. Not only do the Petitioners misconstrue the record and non-record facts upon which they attempt to build their legal arguments, but their legal arguments fall far short of constituting any basis for certiorari review by this Court.

Both the Bankruptcy Court and District Court opinions discussed at length principles related to the Petitioners' equal protection arguments. While Petitioners continue to insist that they are entitled to a "merit determination" or mini-trial on their alleged claims of discrimination, they have wholly failed to establish its existence in either the original assessments or the settlement values approved by the Bankruptcy Court. The lower court's decisions are not in conflict with any decision cited by the Petitioners. The Petitioners' continued pronounced beliefs of the existence of discrimination simply do not take the place of proof necessary to establish its existence. The record before the Bankruptcy Court lacked a proffer of the slightest scintilla of expert evidence showing the existence of any such discrimination. Similarly, nothing but the Petitioners' own suggestions of comparability

with respect to several parcels of property mentioned in the Petition establishes their comparability from an assessment standpoint. Moreover, the record and Petitioners' own unsupported assertions do not suggest disparity between the assessments of the subject property and comparable properties in the magnitude of 800% to 3,500% which formed the basis of this Court's decision in *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1988).

The Bankruptcy Court properly evaluated the risks, liabilities, benefits and gains associated with continuation of the fourteen separate State court actions. The lawsuits in question were clearly assets of the Liquidating Trust and as such the settlement thereof was a proper function in the administration of this bankruptcy. The Petitioners have wholly failed to establish that the Eleventh Circuit's single-sentence affirmance conflicts with any decisions of the other Circuit Courts of Appeal or of this Court on the question of discrimination, or improperly decides a federal question.

IV. FILING OF A CLAIM IN THIS BANKRUPTCY PROCEEDING IS NOT RELEVANT BECAUSE THE CONFIRMED PLAN OF REORGANIZATION PROVIDED FOR PAYMENT OF DADE COUNTY'S STATUTORY AD VALOREM PROPERTY TAX LIENS IN FULL FROM THE PROCEEDS OF SALE.

The following section responds to sections II and IV of the Petition. The Debtors introduce the second issue in their Petition with the following one-sentence paragraph:

> A Writ should be issued to determine *whether a bankruptcy court has statutory authority*

> *to confirm a plan* granting a local government taxing authority preferential treatment, which provides for the Dade County Tax Collector's participation in the distribution of the estate, notwithstanding his failure to file timely proofs of claim or an application for payment as administrative expenses of disputed real property taxes. Pet. 16. (Emphasis supplied).

Confirmation of the Plan has long since become final and the Petitioners' attempt to again attack its provisions is beyond the Court's certiorari jurisdiction in this proceeding. Similarly, Petitioners' final and retreating argument, under point IV, was disposed of by provisions of the confirmed Plan of Reorganization, and is therefore beyond the Court's certiorari jurisdiction herein.

Unfortunately for the Petitioners, the Plan the terms of which they here still attempt to contest has long since been confirmed by the Bankruptcy Court, substantially consummated, and subjected to three layers of judicial review, including a petition for certiorari to this Court. *See* notes 6, 7 and 8, *supra*. Petitioners have had their days in court. *See* text accompanying note 2, *supra*. Petitioners' present attempt to seek review of features of the confirmed Plan providing for payment of the real property ad valorem taxes on the Miami Center Project is therefore untimely and improper.

In contravention of the confirmed plan, Petitioners argue that they have a vested legal right to recover certain expenses and that the County is precluded from obtaining payment in satisfaction of tax liens because no claim was filed. Pet. 16-21; 28-30. It is axiomatic that Petitioners' failure to raise these objections in response to the proposed plan of reorganization constitutes waiver. If

the objections had been timely made and considered justified by the Bankruptcy Court or creditors, the Bank of New York, as proponent of the Plan, need only have reduced its proposed purchase price by the amount of the ad valorem property tax liens, and purchased the property subject to the liens. This is true because if not paid under the Plan, the County would have been free to enforce its unimpaired liens in state court against the collateral. *See In re Folendore*, 862 F.2d 1537 (11th Cir. 1989); *Lindsey v. Federal Land Bank of St. Louis*, 823 F.2d 189 (7th Cir. 1987); *Tarnow v. Commodity Credit Corporation*, 749 F.2d 464 (7th Cir. 1984); *In re Sillani*, 9 Bankr. 188, 189 (Bankr. S.D. Fla. 1981). For the court to have subject matter jurisdiction thereover, a debtor must question the validity of a lien *prior* to, not five years after, confirmation. This principle applies to real property tax liens. *In re Work*, 58 Bankr. 868, 869 (Bankr. D. Ore.), *aff'd*, case no. CV86-1028FR (D. Ore. November 21, 1986).

The Eleventh Circuit dispatched the claims of Petitioners herein in a single sentence, with no citation to authority. It is apparent that the Circuit Court viewed the Debtors' claims as lacking precedential significance. Thus, in addition to disposing of the issues correctly, the Circuit Court's single-sentence opinion lacks impact as stare decisis. *See* note 4 at p. 8.

Moreover, there is nothing surrounding Petitioners' proof of claim argument which makes it any less capable of being resolved by settlement than the other issues resolved by the Bankruptcy Court's order approving the comprehensive property tax settlement. The record below amply demonstrates that the Petitioners' arguments were

given full consideration and contributed to the substantial economic savings realized by the Trust from the settlement.

CONCLUSION

The Eleventh Circuit's single-sentence affirmance of the District Court's affirmance of the Bankruptcy Court's decision approving the amended settlement of ad valorem tax claims is correct. The Circuit Court decision does not conflict, either facially or in principle, with any decisions of this Court or of any circuit court.

The Petition should be denied.

Respectfully submitted,

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and

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Counsel of Record
Assistant County Attorney

Attorneys for Dade County, Joel Robbins & Fred Ganz

APPENDIX

Voluntary Petition Under Chapter 11;
Case No. 84-01593-BKC-TCB;
In Re: Chopin Associates

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

In re CHOPIN ASSOCIATES, a Florida General Partnership I.D. NO. 52-1167860 Debtor Include here all names used by debtor within last 6 years	*CASE NO.* 84-01593-BKC-TCB *(Chapter 11)* VOLUNTARY PETITION UNDER CHAPTER 11

RELIEF ORDERED

1. Petitioner's post-office address is 100 Chopin Plaza, Miami, Florida 33131

2. Petitioner has had his principal place of business ~~(or principal assets)~~ within this district for the 180 days immediately preceding the filing of this petition ~~(or for a longer portion of the 180 days immediately preceding the filing of this petition than in any other district)~~.

3. Petitioner is qualified to file this petition in that he is qualified to be a debtor under Chapter 7 of the Bankruptcy Code as a voluntary debtor.

4. A schedule of debtor's assets and liabilities and a statement of debtor's financial affairs (or a list of debtor's creditors) accompanies this petition (or a list of debtor's creditors accompanies this petition).

Wherefore, petitioner prays for relief under Chapter 11 of the Bankruptcy Code.

KENT WATTS DURDEN KENT
NICHOLS & MICKLER

Signed: /s/ illegible

[X] *Attorney for Petitioner*
[ ] *Petitioner*
(Petitioner sign if not represented by attorney.)

Address 850 Edward Ball Building
Jacksonville, Florida 32202

CERTIFICATION

INDIVIDUAL: I, ___, the petitioner named in the foregoing petition, certify under penalty of perjury that the fore-going is true and correct.

CORPORATION: I, ___, the president (or other officer or an authorized agent) of the corporation named as petitioner in the foregoing petition certify under penalty of perjury that the foregoing is true and correct, and that the filing of this petition on behalf of the corporation has been authorized.

PARTNERSHIP: I, Theodore B. Gould, President of Miami Center Corporation, General Partner of Chopin Associates, a Florida General Partnership, ~~a substitute (or an authorized agent)~~ of the partnership named as petitioner in the foregoing petition, certify under penalty of perjury that the foregoing is true and correct, and that the

filing of this petition on behalf of the partnership has been authorized.

Executed on: August 22, 1984

Signed: /s/ Theodore B. Gould
Theodore B. Gould

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.
CHAPTER 11

IN RE:

THEODORE B. GOULD

Debtor.

LIST OF TWENTY LARGEST UNSECURED CREDITORS

There is one unsecured creditors [sic] of this Debtor.

DATED this 22nd day of August, 1984.

/s/ Theodore B. Gould
Theodore B. Gould

App. 5

CHOPIN ASSOCIATES
ACCOUNTS PAYABLE/ACCRUED LIABILITIES
JULY 31, 1984

Tax Collector-Dade County	4,959,186.16

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.
CHAPTER 11

IN RE:

CHOPIN ASSOCIATES, a
Florida General Partnership,

Debtor.

LIST OF ALL CREDITORS

Attached hereto is list of all creditors to the Debtor.

DATED this 22nd day of August, 1984.

CHOPIN ASSOCIATES

By: /s/ Theodore B. Gould

App. 7

CHOPIN ASSOCIATES

ACCOUNTS PAYABLE/ACCRUED LIABILITIES

JULY 31, 1984

Bank of New York	$ 33,682,791.94
Tax Collector-Dade County	4,959,186.16
	$ 38,641,978.10

CERTIFICATE OF RESOLUTION

STATE OF FLORIDA)
COUNTY OF DADE) SS.
)

Before me, the undersigned authority, this day appeared THEODORE B. GOULD, to me known and known to me to be the President of MIAMI CENTER CORPORATION, a Florida corporation, who after being first duly sworn upon oath did depose and say that the following Resolution was duly adopted at a Special Meeting of the Board of Directors of MIAMI CENTER CORPORATION, a Florida corporation, at 3:30 p.m. on the 21st day of August, 1984, at Miami, Florida:

> RESOLVED: That this Corporation, as a General Partner of Chopin Associates, a Florida General Partnership, execute and file a Petition for a voluntary Chapter 11 under the Bankruptcy Reform Act of 1978 for Chopin Associates and that KENT, WATTS, DURDEN, KENT, NICHOLS & MICKLER, Attorneys at Law, be retained as counsel for the purpose of preparing, presenting and filing said Petition and to represent Chopin Associates in the proceedings.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Theodore B. Gould
THEODORE B. GOULD, President

Sworn to and subscribed before me
this 21st day of August, 1984.

/s/ illegible
Notary Public, State of Florida

My Commission expires:

Notary Public; State of Florida at Large
My Commission Expires June 29, 1986